Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

KONRADS KALEJS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dated: January 31, 1994

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78 pp

QUESTIONS PRESENTED

1. Whether video taped depositions taken in the late 1980s inside of the Soviet Union and presided over by a Soviet procurator are admissible in a deportation hearing, or alternatively, are they sufficient as a basis for reasonable, substantial and probative evidence, when neither the United States Office of Special Investigations (government attorneys, hereinafter "OSI") nor Petitioner, Kalejs, (hereinafter "Kalejs") were allowed by the Soviets to (a) interview any of the Soviet prepared witnesses prior to the taking of the depositions; (b) nor possess, review or use on examination or cross examination admittedly existing prior statements of the witnesses given shortly following the end of World War II; (c) nor afforded free movement in Soviet countries to the visit sites and seek witnesses; and (d) each, including OSI's key expert witness, were

barred from admission to, and research at, the Soviet Archives that contained relevant documents and prior statements of the witnesses which now prove exculpatory?

2. Whether, in a deportation case, under the principle of Brady v. Maryland, 373 U.S. 83 (1963), OSI was obligated to produce to Kalejs a book published in the Soviet Union one page of which OSI introduced into evidence which names the Commander of the external guard of Salaspils and Sauriesi Concentration Camps, but does not mention the name, Kalejs, where OSI alleged and Kalejs was found to be the Commander of the external guard of the camps?

3. Where OSI over a course of many years has had cooperation of a totalitarian government whose discretion is unfettered in the choice of documents and witnesses used in a U.S. tribunal for the purpose of deporting a resident of a Unit-

ed States, and the totalitarian government refused to cooperate with the defense, and that totalitarian government is dissolved subsequent to the hearing and first appeal ordering deportation and Kalejs is now able to interview witnesses, visit sites and research in those formerly closed foreign archives and Kalejs has made a showing that additional evidence in proper form favorable to the defense will become available, whether Kalejs should be afforded an opportunity to obtain and present favorable evidence?

4. Whether the opinion testimony of Dr. Hilberg that Kalejs was a member of Arajs Kommando based solely upon his general knowledge of Holocaust history, documents provided from Germany that went only to the deeds of Arajs Kommando, and several Soviet selected documents naming Kalejs as a member of Arajs Kommando that Hilberg himself admits were less compelling when

not produced in context and allegedly existing but unproduced Soviet documents constitutes reasonable, substantial, probative evidence sufficient to affirm the decision or whether his opinion was based principally on absent documents and an absent statement of one Abols, alternatively, whether Hilberg's opinion testimony that Kalejs was a member of Arajs Kommando was not a proper subject of expert testimony and inadmissible?

5. May a person be deported under the Holtzman Amendment, 8 U.S.C. Sec. 1251(a)-(4)(D), as one who, under the direction of the Nazi regime, "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion," without proof that he personally committed war crimes or any atrocities?

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KONRADS KALEJS, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Konrads Kalejs, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 17, 1993.

OPINIONS BELOW

The Seventh Circuit's opinion of November 17, 1993 is reported at 10 F.3d 441 and reproduced at APP 1. Its judgment of the same date is reproduced at APP 394.

On December 1, 1993, petitioner filed a timely Petition for Rehearing which was denied on December 30, 1993. (Order denying rehearing reproduced at APP 396).

The Seventh Circuit's judgment affirmed orders of the Board of Immigration Appeals dated April 30, 1992 (reproduced at APP 193), which in turn affirmed the decision of the Immigration Court rendered on November 1, 1988 (reproduced at APP 102).

STATEMENT OF JURISDICTION

Jurisdiction in the court of appeals to review the orders rendered by the Board of Immigration Appeals rested upon 8 U.S.C. Sec. 1105a(a).

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

(i) The judgment sought to be reviewed was rendered on November 17, 1993.

(ii) Petition for Rehearing was denied on December 30, 1993. On January 10, 1994 by agreement with the Office of

the Solicitor General the Clerk of this Court was informed the government will not deport Kalejs, or alter the current status of his custody, pending disposition of the petition for a writ of certiorari, provided the petition is filed with the Court and received by its office on or before February 1, 1994. On January 10, 1994 the Seventh Circuit ordered its judgment stayed until February 7, 1994 (APP 398).

(iv) 28 U.S.C. Sec. 1254. Courts of appeals; certiorari; . . .

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

STATEMENT OF THE CASE

I. INTRODUCTION: HISTORY OF THE CASE,

ALLEGATIONS, AND FINDINGS BELOW

IA. INTRODUCTION

Konrads Kalejs (petitioner, hereinafter "Kalejs") is an eighty year old native of Latvia and a naturalized citizen of Australia. He resided in Latvia from 1914 to 1944 including the period of the German occupation. He was admitted to the United States for permanent residence in 1959 and lived a productive but uneventful life until an Order to Show Cause was brought by the Office of Special Investigations (OSI) in 1984.

IB. PRIMARY CHARGES AND ISSUES

An amended Order to Show Cause was prepared in 1988. It alleged Kalejs was deportable pursuant to now numbered 8 U.S.C. Secs. 1182 (a)(3)(E), 1251(a)(1)(A), 1251-(a)(1)(B), 1251(a)(4)(D). He is ordered deported.

The essential issues are:

1) Whether Kalejs participated in, or

assisted in, persecution under the Holtzman Amendment, and

2) Whether Kalejs made any wilful misrepresentation of a material fact in the application he made in connection with the issuance of his United States visa.

The two issues are interrelated. In the visa application in 1959, Kalejs stated he had been a farm laborer during the war. He had worked from time to time on a farm during the war, however, the statement is incomplete. Kalejs admitted in both an unrepresented precharge sworn statement and in this testimony at trial he served in Latvian military units fighting with the Germans against the Russians. If that was the extent of his wartime activities, he would not have been excluded from entry in 1959. Since, if that were the truth, then it appears that the allegedly false statement (that he was a farm laborer) would not alone have been deemed material

so as to preclude his entry into the United States at that time.[1]

OSI alleges that Kalejs participated in the persecution of Jews and others and was, indeed, a member of a "killing squad," Arajs Kommando, that murdered some 73,000 persons from July, 1941 through December 8, 1941. One can legitimately ask: if the INS had not believed that Kalejs participated in such persecution, would it nevertheless have maintained that he should be deported because of a wilful misrepresentation of material fact on his visa application? The two issues cannot be separated. If the persecution allegations cannot be sustained, then the basis

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[1] Kalejs admitted and the Board of Immigration Appeals found he had served as company commander for the Germans in a Latvia Ski Company fighting the Russians at the Eastern Front in 1942. The Board determined this military duty did not constitute participation in persecution within the meaning of the Holtzman Amendment (APP 324,5). In 1944 Kalejs joined and served in the Latvian Legion of the German SS. This fact did not enter into the decision of the tribunals below.

for determining that the visa misrepresentation was material will be lost.

IC. DETAILED ALLEGATIONS AND FINDINGS

The contested allegations (7-25) relate to three major substantive issues, one of which has several sub-parts.

The first issue was whether Kalejs' membership or activities in an unnamed Latvian self-defense unit at Litene in mid-July, 1941, shortly after the invasion of Latvia by Germany, constituted participation in persecution. The Immigration Judge thought not. BIA made no finding.

The next issue was whether Kalejs was a member of the Arajs Kommando and, if so, whether his activities in that unit constituted participation in persecution. This issue had four sub-parts:

1) Concerning activities from July, 1941, through December, 1941 [the period of 73,000 killed]. The IJ held "... the evidence reflects that the [he] signed

his name to the rolls of the Arajs Kommando in July [1941] ... There is no evidence of participation or assistance beyond this act ... I find the government has failed to sustain its heavy burden of proof ..." The BIA reversed. 2) Concerning the period from January, 1942, to November, 1942. The Immigration Judge found ". . . [Kalejs] was a member of Arajs Kommando . . . on the eastern front from January through fall of 1942, . . . and that [Kalejs] assisted and participated in this persecution." The BIA reversed. (APP 324,5). 3) For the year 1943. The Immigration Judge ruled ". . . [Kalejs] was the Company Commander of a guard unit at a camp for Latvian Jews in Porkov, and that members of his company participated in the execution of 20-39 gypsies in Porkov . . . [Kalejs] assisted in persecution . . . in Porkov in 1943." The

BIA affirmed.

4) Dealing with [Kalejs'] alleged role as a Company Commander of the external guard unit at Salaspils and Sauriesi concentration camps. The Immigration Judge found ". . . [Kalejs] was a Company Commander under the Arajs Kommando and German SD of the armed exterior guard unit at Salaspils and Sauriesi . . . [Kalejs's] positions and activities at [these camps] constituted assistance and participation in persecution . . . ." The BIA affirmed.

The third major issue is whether Kalejs misrepresented his membership and activities in connection with the Arajs Kommando and, if so, whether such misrepresentation was material. The Immigration Judge found that ". . . [Kalejs'] failure to reveal his wartime activities when applying for his U.S. visa was a willful and material misrepresentation." The BIA affirmed.

The lack of congruity between the findings of the IJ and the BIA on the various issues is striking. They disagreed on all but the following: The BIA affirmed the IJ's ruling that Kalejs was the company commander of a guard unit for Latvian Jews at Porkov and "that members of his company participated in the execution of 20-39 gypsies in Porkov."[2] And the BIA affirmed the IJ's finding that Kalejs was the company commander of the exterior guard unit at Salaspils and Sauriesi concentration camps and that his "positions and activities" at [those camps] constituted assistance and participation in persecution.[3]

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[2] The sole evidence of concentration camp duty at Porkov and the killing of gypsies there was that of Soviet video tape witness Strazds. He testified Kalejs was not present at the execution carried out by Germans and gave no orders. (APP 327,9). Newly discovered evidence reveals Strazds post war association with the KGB.

[3] No document in evidence supports this finding. Its sole support is Soviet video tape depositions held inherently unreliable by Judge Manion and Judge Eisele (APP 32).

Finally, based upon the above findings, BIA affirmed the IJ's finding that Kalejs's failure to reveal his wartime activities in his visa application constituted a wilful and material misrepresentation.

ID. THE SEVENTH CIRCUIT'S FINDINGS

The Seventh Circuit affirmed with Judge Eisele providing a detailed dissent. The Seventh Circuit's opinion did not make findings on an issue by issue basis. The Majority stated: "The charges levelled against Kalejs undoubtedly qualify as assistance in persecution under the Holtzman Act," mentioned OSI documents and witnesses, indicated "[t]he immigration judge and the BIA did not believe Kalejs' denials and neither do we," found "the BIA was amply justified in concluding Kalejs assisted in persecution of people . . . within the meaning of the Holtzman Amendment," found he made a material misrepresentation, that the hearings "were con-

ducted with eminent fairness to Kalejs," and based the decision on the substantive test, "atrocities committed by a unit may be attributed to the individual based on his membership and seeming participation."

The concurring opinion of Judge Manion holds: "Although I agree with the dissent that 'evidence' generated under the watchful eye of the Soviet dictatorship is inherently unreliable and has no place in an American proceeding, I think the untainted evidence supports the Board's decision." He affirms on "the highly deferential standard by which we review Board deportation decisions." (APP 32,33).

The dissent of Judge Eisele states:

> ". . . [T]he Soviet authorities had a very good reason to implicate him [Kalejs] personally: they considered him a traitor for fighting with the Germans. (APP 77) . . . I am unaware how the Soviet evidence was 'corroborated by Western documentation plus reliable eyewitness testimony subject to vigorous cross-examination.' . . . The majority's statement that it will not discard a case against a Nazi collaborator mere-

> ly because some of the evidence originated in the Soviet Union assumes . . . [Kalejs'] guilt when that is precisely what is in issue. . . (APP 77,78). I do not believe that 'atrocities committed by a unit may be attributed to the individual based [solely] on his membership and seeming participation.'(APP 55). I . . . conclude that the deportation order can not be affirmed on this record." (APP 97).

II OSI EVIDENCE

The evidence against Kalejs is of several kinds: testimony of Dr. Raul Hilberg, an historian; documents from Germany; depositions of Soviet citizens taken inside of the former Soviet Union; and documents produced from Soviet archives.

IIA SOVIET DEPOSITION EVIDENCE IS INADMISSIBLE

Several of the depositions taken under Soviet control constituted the sole eyewitness identification testimony.

Each of the Soviet deposition witnesses had been imprisoned for years in Soviet gulags. At the depositions each was faced with a Latvian Soviet procurator who pre-

sided over the deposition and two of his assistant Latvian procurators, two procurators from the Central Soviet government, two OSI attorneys, a defense attorney, a translator and a video tape operator. Each OSI witness previously had been interrogated by the Latvian Soviet procurator who presided at the depositions. The protocols of these interrogations produced by the Soviets specifically for this case were nearly the only prior written witness statements the Soviet chose to reveal. Many written statements of OSI witnesses were taken relevant to this case in the 1940s and 1950s. The Soviet Union refused their production.

The Soviets forbade OSI and the defense: 1. to review the 1940s and 1950s witness statements; 2. to interview OSI witnesses prior to the actual taking of their deposition in the Soviet Union; 3. to travel inside of the Soviet Union to investigate;

4. to enter any Soviet archives to investigate and to obtain witness statements.

IIB "WESTERN" DOCUMENTS

Western documents produced include 1940s reports of the German SS of atrocities and the 1980 German court decision in the war crime case of People v. Arajs, District Court of Hamburg, 1980, Exhibit 22T. No "Western" document identified Kalejs with Arajs Kommando or its activities.

IIC LATVIAN DOCUMENTS

Kalejs had sought to enter the University of Riga in the fall of 1940. He could be admitted if he provided the University with proof he had aided and was aiding the anti-Soviet forces. Kalejs mentioned his problem to a former Latvian Army noncom who agreed to obtain documents for the University admission. These documents were produced by the Soviet Union and placed in evidence. They appear to be signed by Arajs and by others stating that

Kalejs was a member of Arajs Kommando. Kalejs was enrolled in the University based upon these documents.

IID TESTIMONY OF RAUL HILBERG

Hilberg was qualified as an expert on the history of the Holocaust. He reviewed the University documents. Hilberg testified of these Soviet documents:

> "The problem I have encountered with materials that come from the Soviet Union is . . . I do not see the entire folder from which the document is taken. What I am missing is a context, a before and after, which would make it possible for me to better understand the contents of the document." (V.3, 1090).

Hilberg also stated:

> ". . . whether I credit Soviet documents . . . I would have to look at it to the nth degree . . . I might probably come to the conclusion that these documents are not to be credited." (V.3 1096)

Notwithstanding, Hilberg opined based solely upon Soviet documents Kalejs was a member of Arajs Kommando.

Hilberg disagrees with high judicial standards of proof and, for himself, de-

termines "fact" as "what is most likely true" (v.3, 1056). No where does Hilberg testify that he concluded Kalejs was a member of Arajs Kommando within a reasonable degree of historical certainty.

Hilberg opined, based solely upon what OSI now claims to be a Soviet Abols statement -- that was not produced to Kalejs or the courts -- that Kalejs was the commander of the external guard at Salaspils and Sauriesi Concentration Camps. Both the IJ and the BIA said they disregarded Hilberg's testimony of Abols alleged statement since it was not produced and was not offered into evidence.

III NEWLY DISCOVERED EVIDENCE

After the close of the evidence in this case the Soviet Union dissolved. In 1993 Kalejs learned his researcher could enter the former Latvia SSR Soviet archives. Newly discovered materials were first presented to the Seventh Circuit by OSI in

the spring of 1993. At that time Kalejs asked the Seventh Circuit to continue oral argument to give him an opportunity to research in Latvia. This motion was denied. Kalejs continued with his efforts and filed exhibits with motions seeking a stay of the mandate with the Seventh Circuit, with the BIA to reopen, and finally accompanying an application to Justice Stevens.

This newly discovered evidence does not mention Kalejs in relationship to membership in Arajs Kommando. The historical texts name many men and officers of Arajs Kommando including the commander of the external guard at Salaspils and Sauriesi Concentration Camps. They do not name Kalejs. Several Soviet video tape witnesses recant or revise their testimony, several have died and one lives in Russia and is not available to Kalejs. 1940s and 1950s statements of the Soviet witnesses have been found. None mention Kalejs.

REASONS FOR GRANTING THE WRIT

Petitioner requests that certiorari be granted by this Court:

1) to exercise its power of supervision where the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the INS by admitting and placing substantial weight on "expert" testimony and Soviet procurator prepared witnesses' video tape depositions. Sup. Ct. R. 10.1(a);

2) to resolve an intercircuit conflict concerning the proper construction of the Holtzman Amendment: whether deportation under the statute requires proof of the alien's personal participation in atrocities or war crimes as the Sixth and Ninth Circuits have held, or, as the Seventh Circuit held: "atrocities committed by a unit may be attributed to the individual based [solely] on his membership and seem-

ing participation." Sup. Ct. R. 10.1(a).

I SOVIET EVIDENCE IS INHERENTLY UNRELIABLE

The Communist system of government was formed under Lenin. Lenin espoused a fundamental principle of the Soviet Union when he said:

> "To speak the truth is a petty bourgeois prejudice. To lie, on the other hand, is often justified by its ends."

The Secret Offensive, Chapman Pincher, Sidgwick & Jackson Ltd., London (1985) at page 24. See, Soviet Evidence in North American Courts, S. Paul Zumbakis of the Illinois Bar, Americans for Due Process, Chicago (1986), Chapter 6, pp 96-108. The Soviet "justice" system is not based upon the Anglo/American adversary principle; it is based upon the antithetical inquisitorial principle repudiated centuries ago with the abolition of Star Chamber.

It is established in our courts that the KGB (Soviet Secret Police) has resorted to

torture to obtain evidence, cheated and lied. See dissent, Kowalchuk v. United States, 773 F.2d 488, at 503,4,5 (1985) and authorities compiled there.

A former Soviet procurator who defected testified OSI cases were considered political-state security matters to them and the KGB was employed in these investigations. Matter of Maikovskis, Immigration Court, testimony of July 1, 1981. " . . .the KGB was responsible for preparing the . . . witnesses for OSI interrogation by examining them and obtaining written statements." United States v. Kungys, 571 F.Supp 1104 (D.N.J., 1983). The KGB as the Soviet secret police was charged as the Communist Party's enforcement agency. Kowalchuk, supra, at 503, f.n. 5. KGB formed a Latvian Committee for Cultural Relations of Latvians abroad with its objective to discredit Latvian emigres charging them with war crimes and collabo-

ration.[4] The "facts" were often embellished and supplemented with forged documents, false testimony and pure invention. Kowalchuk, supra, at 504,5.[5]

Two of the three judges in the Seventh Circuit panel acknowledged this unreliability: Judge Manion stated: " . . . I agree with the dissent [of Judge Eisele] that 'evidence' generated under the watch-

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[4] Kalejs was a graduate of the prewar Latvian Military Academy and a 1st Lt. in the Latvian Army. The Soviet's conquered and illegally incorporated independent Latvia into the Soviet Union in 1940. It involuntarily absorbed the Latvian military, including 1st Lt. Kalejs, into the Red Army. Kalejs testified he led the Latvian Ski Company in battle against the Soviet Union in 1942. Thus, to Soviet eyes Kalejs was guilty of high treason. Incidentally, the Seventh Circuit majority opinion's finding, "Again Kalejs sided with the victors; he deserted his Red Army comrades . . .(APP 5) " is a distortion of history. The Red Army had executed or deported most of the Latvian officer corp. They were not Kalejs' or Latvia's comrades.

[5] Soviet Union lies continued throughout its existence concerning World War II. This perfidy began no later that the Nuremberg Trial of the Major War Criminals, Proceedings Volume 7, p 425; Volume 9, p 3,4; Volume 17, p 274-545 where Soviets falsely blamed the Nazis for the massacre of thousands of Polish officers in the Katyn forest the Soviets had perpetrated and ended no sooner than its recent admissions that it held United States citizens as prisoners of war from World War II in spite of the fact we were then "allies." Kalejs trial took place during this "cold war."

ful eye of the Soviet dictatorship is inherently unreliable and has no place in an American proceeding . . . " (APP 33).

II SOVIET DEPOSITION EVIDENCE IS INADMISSIBLE

Additional objections to the Soviet deposition materials are: 1. Restrictions placed upon the defense prevented the defense from meaningful cross examination and from developing a defense; 2. Soviet restrictions placed on OSI prevented the prosecuting office of the United States from verifying the truthfulness of the Soviet witnesses for whom it must vouch.

Near the end of World War II, Soviet Red Army forces reoccupied Latvia. It captured witnesses to the German occupation. The Soviets interrogated them. The written statements, called protocols, then taken of the video tape Soviet witnesses and at their previous trials sought by the defense were withheld by the Soviets.

Some exist in the Latvian archives. [6] The statements produced for Kalejs' trial were recently orchestrated by the Soviets.

Remarkably, not even OSI was permitted to interview the witnesses prior to the taking of their depositions just as the defense was refused pretrial interviews. Free personal movement was restricted within the Soviet Union and neither the defense nor OSI could launch an independent investigation. Entry to the Soviet Archives was prohibited to OSI, its historian and the defense. The archives hold impeaching prior witness statements.

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[6] Each of the Soviet deposition witnesses testified at their depositions they had given written statements in the 1940s and 1950s to the Soviet authorities. The Soviet Procurator stated he would make no effort to produce these statements unless he were given the date of each statement and the agency of the Soviet Union involved and in no case would he produce any statements given to the KGB or in preparation for the deponent's or another person's trial. Following the dissolution of the Soviet Union, in 1993, Kalejs' researcher was able to enter Latvian Archives. Statements of several of the Soviet witnesses from the 1940s and 1950s have been discovered. These statements do not mention Kalejs' name and are exculpatory in nature.

Kalejs was released from INS custody after posting $750,000, 100% cash bond. The bond required he remain in the United States. The Soviet's would not inform the defense whether it would arrest Kalejs if he entered the Soviet Union. Kalejs was unable to attend the taking of the evidence and be present to aid his attorney.

The Soviet procurator informed the witnesses that they need not answer questions against their dignity, thereby frustrating cross-examination efforts of the defense to show interest, bias and susceptibility to intimidation.

These unwarranted restrictions substantially impaired the defense's right to cross examination. The restriction on OSI made it impossible for the United States to independently evaluate the Soviet Union's evidence it presented as its own -- it can not vouch for its own witnesses.

Amendment V to the Constitution requires

that "no person shall . . . be deprived of . . . liberty . . . without due process of law . . ." Congress and the Attorney General have attempted to provide procedural due process in deportation cases. 8 U.S.C. Sec. 1252(b) for Immigration Court proceedings provides:

> ". . . the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government. . ."

8 C.F.R. Sec. 242.16 (1988) provides:

> ". . . the respondent . . . will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government. . ."

This case concerns facts of more than fifty years ago that took place in a country thousands of miles away. The examination took place without the presence of the defendant. Each witness had been personally prepared by Soviet agents and the only witness statements supplied were

of recent date prepared by the Soviets especially to support the Soviet's presentation of this case in the United States.

The potential for subtle intimidation is manifest where a witness faces five prosecutors from the office that sent each of them to the Siberian gulags for years. In order of maintain pressure on its witnesses the standard Soviet procedure was to refuse to bring Soviet witnesses to the United States. OSI represents to an American tribunal via its Soviet collaborators the witnesses are ill, however, witnesses are able to travel.[7]

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[7] It is evident from viewing the video tape depositions of the Soviet's witnesses, their health does not prevent travel to the United States to testify. Rozkalns complained of a sciatic nerve problem from his years in a Soviet penal mine (7068). Murnieks simply said he does not want to come to the United States (6314). Pimanis said no one asked if he would come to the United States and he does not want to (7158). "It is known to the Court that witnesses in the Soviet Union generally do not receive exit visas. This, however, is not openly discussed by the Soviets, but generally bears the remark that the witness can not travel due to poor health. When Mrs. MEDALJE did not respond to the summons to Hamburg, but did appear

(continued...)

No reasonable opportunity is afforded to cross-examine where the passage of fifty years excuses all memory failures, where each witness is prepared with an especially designed script by an occupying alien sovereign power imbued with the Star Chamber principle of the Inquisition. Without the witnesses prior statements of the 1940s and 1950s, opportunity for investigation and pretrial interviews the defense was not afforded a reasonable opportunity to cross-examine. The tribunals below and the Seventh Circuit failed to afford Kalejs this essential right.

There are eleven other United States cases involving use of OSI's Soviet deposition evidence. OSI admits the deposi-

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[7](...continued)
for the interrogation in Riga, it became clear that the medical reasons had only been contrived. This also applies for the witnesses LUTRINSCH and KALNINSCH who, though ready to travel, did not appear in Hamburg." Decision in the case of People v. Arajs, District Court of Hamburg, 1980, Exhibit 22T, (v.11, 3756).

tions were neither credited as principal nor as corroborative inculpatory evidence in three of those cases (7th Cir., R. Br., p 8). [8] None of the other eight cases used the Soviet depositions as principal inculpatory evidence. OSI has not taken issue with the assertion in previous Kalejs' Briefs that:

> "The previous Seventh Circuit cases decided favorably to OSI regarding 'participation in persecution' each had the required, official German military documents in evidence showing names, birth dates and military assignments that formed the basis of the persecution counts, with photographs of those defendants' attached -- most displayed defen-

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[8] Case 1. Matter of Laipenieks, A11 937 435, (Immigration Court, San Diego 1982), the judge indicated he did not give them any credit at all. "[W]e find tht (sic) the [Soviet] depositions do not meet the fundamental fairness test of Martin-Mendoza." See Martin-Mendoza v. INS, 499 F.2d 918, 921 (9th Cir 1974) and 8 C.F.R. 242.14(c).

Case 2. Matter of Maikovskis, A8 194 566 (Immigration Court, New York, 1983), "Such testimony cannot support the burden the Government must bear."

Case 3. United States v. Sprogis, No. CV-82-1804 (E.D.N.Y. 1984), "[I]t is unnecessary to resolve the issues raised by the defendant concerning the admissibility of any depositions taken behind the iron curtain." The circuit court elected not to rely on the Soviet depositions in any way. United States v. Sprogis, 763 F.2d 115 (2d Cir 1985).

dants' fingerprints."

No such documents were offered against Kalejs. The other eight cases, [9] gave

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[9] Case 1 United States v. Koziy, 540 F.Supp. 25 (S.D.Fla. 1982) depositions were also taken in Poland. The issue of inadmissibility of depositions was not raised and the court did not rely on them. Defense counsel did not participate in the Koziy Soviet depositions. 540 F. Supp. at p. 13, f.n. 14.

Case 2 United States v. Palciauskas, 559 F.Supp. 1294 (M.D. Fla. 1983), aff'd, 734 F.2d 625 (11th Cir. 1984), the "testimony of persons in a position to know and who claimed knowledge," included Soviet deponents and other witnesses. Moreover, the Soviet depositions played no role since the Court in its Finding 24 specifically declined to rule that Palciauskas participated in persecution. The 11th Circuit held as to the admissibility of the Soviet depositions: "any error that may have occurred was harmless" due to Palciauskas' admission that he was the Mayor of Kaunas in 1941-42 during the Nazi occupation. The Circuit Court ignored the Soviet depositions. 734 F.2d at 627. Defense counsel did not participate in the Soviet depositions.

Case 3 United States v. Hutyrczky, 803 F.Supp. 1001 (D.N.J. 1992), the depositions were taken in the United States! The defense made no objection to the use of these depositions, and the defendant's own affidavit admitted his Concentration Camp duty.

Case 4 United States v. Linnas, 527 F.Supp. 426 (E.D.N.Y. 1981), aff'd without opinion, 685 F.2d 427 (2d Cir 1982), the trial court gave no weight to the Soviet depositions (p. 434, f.n. 16). The admissibility of the Soviet depositions was not necessary to the decision since Linnas admitted concentration camp duty. Official German documents containing Linnas's signature as Camp Kommandant were properly in evidence. The defense did not participate in the Soviet depositions waiving the issue.

Case 5 United States v. Osidach, 513 F.Supp. 51 (E.D. Pa. 1981), "The Government at trial

(continued...)

Soviet evidence little to no weight. Witnesses from sources other than the Soviet Union claimed personal knowledge and identified the defendants in (Koziy, Palciauskas, Osidach, Kowalchuk); or defendants had admitted membership in (Linnas, Palciauskas); or the documentary evidence was "conclusive" in (Kairys) or depositions

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[9](...continued)
offered several live and videotaped eyewitnesses who each testified as to what they personally observed . . ." (p. 86, 513 F.Supp.).

Case 6 United States v. Kairys, 600 F.Supp. 1254 (N.D.Ill. 1984), aff'd, 782 F.2d 1374 (7th Cir 1986), Judge Moran noted the unfairness of the Soviet deposition evidence and refused to find participation in persecution which was the reason for their proffer. GX-32 was an identification card of Kairys with photo and thumbprint "demonstrates conclusively" Kairys' service at Treblinka concentration camps. 600 F.Supp. at 1261.

Case 7 United States v. Kowalchuk, 571 F.Supp. 72 (E.D.Pa. 1983), 773 F.2d 488 (3rd Cir 1985), three in court witnesses testified from personal knowledge. See page 74 of 571 F.Supp.. Kowalchuk was not found to have assisted in persecution. The Soviet deposition evidence failed to achieve its purpose. 773 F.2d at 491, f.n. 4.

Case 8 United States v. Kungys, 571 F.Supp. 1104 (N.D.N.J. 1983), 793 F.2d 516 (3d Cir 1986), the use of the Soviet depositions was severely restricted. They did not go to identification. "The . . . depositions will be admitted for the limited purpose of establishing the happening of the killings in . . . 1941." at p. 1132 of 571 F.Supp. The judge noted the restrictions on and fundamental unfairness of the Soviet depositions.

were limited to show killings occurred in (Kungys); or in the most recent case the depositions were taken in the United States in (Hutyrczky). Objection by the defense was not made in (Koziy, Hutyrczky); or the defendants did not participate in the Soviet depositions and objection was waived in (Koziy, Palciauskas, Linnas); or held to be at most harmless in (Palciauskas). The Seventh Circuit majority did not consider these cases. The dissent did. Judge Eisele stated: "I find myself in agreement with petitioner's [Kalejs'] analysis of these cases." Here the sole identification witnesses who claim personal knowledge of Kalejs alleged membership and duties were Soviet citizens. Their depositions were taken inside of and under the control of the Soviet Union. No German or Latvian military identification records were introduced relevant to alleged Arajs Kommando member-

ship -- no photo or thumbprint. Kalejs has consistently denied any service with the Arajs Kommando.

In United States v. Kowalchuk, 571 F. Supp. 72 (E.D. Pa. 1983), aff'd en banc, 773 F.2d 488 (3rd Cir. 1985), Judge Fullam commented on Soviet depositions:

> ". . . [F]alse or exaggerated accusations have often been employed by the Soviet government as a political weapon. Finally, considerations of basic fairness to the defendant militate against accepting the testimony of the government witnesses as clear and convincing proof of charges as serious as those leveled against this defendant." (571 F.Supp. at 77, 78, 79, 80, 81).

The present case contains substantially stronger reasons to reject the OSI, Soviet evidence. In Kowalchuk it was unknown that numerous prior written statements of the Soviet witnesses were not produced, that site and archive visit requests were denied. The inability of OSI to vouch for its witnesses was unknown. Mr. Kowalchuk, a United States citizen, was not required

by a bond to remain within the United States. Since the Kowalchuk decision reprehensible Soviet conduct has been exposed inside United States Courts as has been fraud of OSI attorneys against its targets. See Demjanjuk v. Petrovsky, 10 F.3d 338, 1993 U.S. App. LEXIS 29694 (6th Cir. 1993).[10] The only eyewitness testimony against Kalejs as to identity, membership and activities are the Soviet controlled depositions untested by the defense and untested by OSI. The admission of the Soviet deposition evidence under these circumstances is a violation of the fundamental right to due process undermining the integrity of the fact finding process. Compare, Martin-Mendoza v. INS, 499 F.2d 918, 921 (9th Cir 1974) and 8

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[10] In Israel five alleged eyewitnesses wrongly identified Demjanjuk as "Ivan the Terrible" who ran the gas chamber at Treblinka resulting in his sentence to death. Fifty year old eyewitness testimony is not reliable. It is worse yet when supplied by the Soviet Union.

C.F.R. 242.14(c).

The Seventh Circuit relied upon the video tape Soviet witnesses deposition identification. It stated:

> "Several of these witnesses identified Kalejs as the man they knew from an array of 250 photographs, a stunning indictment given the fifty years that have passed since any of these people had seen the accused." (APP 18).

That court fails to appreciate that each of the identification witnesses (all Soviets) testified they had more recently been shown photographs of Kalejs in a Soviet prepared and Soviet conducted photospread. The photospreads displayed eight photographs of six different men -- two photographs of Kalejs were included (App 298). Just prior to again showing Soms this same photospread at his video tape deposition a fifteen minute break was taken (RR 5399). Immediately following the break, Soms was shown the Soviet photographs he had previously marked in the sole presence of the

Soviets (RR 5401). Then Kalejs' attorney showed Soms the array of 250 photographs. Soms reviewed these photographs and the Soviet's took another break (RR 5423). After this break Soms compared the Soviet obtained photos to the defense group (RR 5423-5). This is not "a stunning indictment given the fifty years that have passed . . .," nor a test of memory of years ago, but rather a test of whether after viewing a person's photograph Soms could recognize a photo of that person a few minutes later.[11] What did the Soviets say to the identification witnesses during these breaks? Similarly the other Soviet witnesses were shown the photospreads they had previously viewed shortly before viewing the new photospread.

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[11] Soms who recently provided an affidavit stated he testified he knew Kalejs: "I feared being put back into [prison] camp." Soms there also states he knew nothing of Kalejs' war time activities and he was not ill at the time of the depositions and could have traveled here to testify.

Judge Eisele, dissenting stated:

> "And, in no event can it be said that he had a 'reasonable opportunity to cross examine witnesses presented by the government,' considering the same limitations on discovery (including denial of pre-deposition access to the witnesses and to their prior statements) and the locus and circumstances of the taking of the depositions, including the role of the Soviet procurator in restricting cross-examination. If the regulation does not require this conclusion, surely the Constitution does." (APP 35)

The Seventh Circuit stands alone in accepting Soviet depositions evidence as dispositive. The inherently unreliable Soviet evidence should be stricken. This Court should elect to exercise its supervisory power to insure inherent integrity of the fact finding process below.

III KALEJS WAS PREVENTED FROM PRESENTING A DEFENSE

The Soviet Union prevented Kalejs from travel needed to investigate, prevented him from entering the Soviet held archives to obtain exculpatory documentary evidence and witness leads. The result of these

restrictions prevented the defense from preparing a defense of any kind.

In Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967), the Court stated:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. Id. at 19, 87 S.Ct. at 1923."

The Washington case was a criminal case. But it is applicable here[12]. It is universally accepted United States civil practice that a litigant has the right to prior witnesses statements for impeach-

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[12] See also, ". . . the evidence used to prove the government's case must be disclosed . . . so that he has an opportunity to show that it is untrue." Green v. McElroy, 360 U.S. 474, 496 (1959); Applicable to administrative hearings: Morgan v. United States, 304 U.S. 1, 18-19 (1938).

ment, to be present to aid his attorney at the taking of the evidence against him, to investigate the facts of the case, to interview witnesses, to visit archives holding records used against him or to visit the sites involved in a civil case. Every litigant in any court or administrative tribunal in the jurisdiction of the United States has the right to prepare a meaningful defense and to meaningful cross examination. Deportation from the protection of the laws of the United States may result in prosecution in a foreign country. The gravity of deportation cases impelled the Supreme Court in Woodby v. INS, 385 U.S. 276, 17 L.Ed.2d 362 (1966) to require the government to prove its case by clear, convincing and unequivocal evidence. A standard of proof substantially identical with that required in criminal cases. Klapprott v. United States, 335 U.S. 601 at 612 (1949). See,

United States v. Riela, 337 F.2d 986, 988 (3d Cir.1964). The defense did not have a fair opportunity to be heard, to prepare and present a meaningful defense. The Soviet Union, alone, decided what documents to provide and what witnesses it would supply. It also decided what documents and witnesses not to disclose. [13] OSI acquiesced in these Soviet procedures.

IV "WESTERN" EVIDENCE IS INSUFFICIENT

The Western evidence upon which the majority relies is almost non-existent. As the dissent pointed out: "I am unaware how the Soviet evidence was 'corroborated by Western documentation plus reliable eyewitness testimony subject to vigorous

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[13] "When [the respondent] attempted to prepare a defense, he found the Soviet fox to be the keeper of the chicken house. . . . [The] contention, therefore goes far beyond an argument that he was denied the opportunity to interview potential witnesses. Rather, it is that he was denied the opportunity to develop a meaningful defense of any type." Kowalchuk v. United States, 773 F.2d 488, 501, (1985) in the dissenting opinion of Chief Judge Aldisert.

cross-examination.'" (APP 77,78). The sole eyewitness identification testimony was admitted via video tape depositions taken in the Soviet Union under the watchful eye of the Soviet Procurator.

The sole Western documentation consists of World War II orders and reports, and a postwar judgment against Arajs, himself, all from Germany none mentioning Kalejs.

Dr. Hilberg has testified in many cases on behalf of OSI.[14] He described background events: On June 17, 1940 the Soviet Union invaded Latvia and incorporated it into the Soviet Union (v.11, 3644); on June 22, 1941 Germany attacked the Soviets and pushed them out of the Baltic States (v.3, 836). He discussed his views of Nazi persecution and the role of the Arajs Kommando (v.3, 836-1050). He was quali-

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[14] Hilberg has testified for OSI in seven denaturalization cases and in two other deportation cases (v.3, 835).

fied as an expert on the history of the Holocaust. But, he testified as though he were an expert on membership in Arajs Kommando thereby invading the provence of the finder of fact.[15]

Hilberg based his opinion that Kalejs was a member of Arajs Kommando in part on alleged "testimony" of one Abols. This Abols "testimony" was the sole evidence he relied upon for Salaspils and Sauriesi Concentration Camp duty (1077). It was not credited by either the Immigration Judge nor the Board of Immigration appeals.[16]

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[15] Hilberg's book, The Destruction of the European Jews, does not mention Kalejs, nor does it mention Arajs nor the Arajs Kommando. Hilberg acknowledged that Soviet authorities tightly control all access to all documents concerning World War II war crimes. Kowalchuk v. United States, 773 F.2d at 504. Hilberg had never been permitted to visit a Soviet archives (v.3,1059). He does not read Latvian.

[16] Abols statement, if it exists or existed, was not offered in evidence, nor produced. Abols died in 1963 (v.19, 7209). The Arajs case was tried in the court session of 21 December 1979 and decision rendered 27 October 1980 (v.11, p.3634). (continued...)

At trial Hilberg was shown several Latvian Soviet documents, the "University documents," Kalejs had obtained to enter the University. They falsely state Kalejs was a member of Arajs Kommando.[17] These documents are not compelling even by Hilberg standards. Hilberg's most direct criticism of the Soviet supplied University documents was:

> "The problem I have encountered with materials that come from the Soviet Union is . . . I do not see the entire folder from which the document is taken. What I am missing is a context, a before

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[16](...continued)
Abols was long dead. His "actual statement" would be hearsay. Hilberg's testimony of the alleged substance of "Abols testimony" without its production constitutes hearsay on hearsay and is not admissible. Contradicting OSI's position, Arajs' trial attorney, Bürger, testified that Kalejs' name was not mentioned in the testimony or exhibits of Arajs' trial (v.5, 1778).

[17] Prior to his death Arajs executed an affidavit while viewing some of these exhibits stating that Arajs Kommando provided such false documents to aid fellow Latvians and that he, himself, had signed several. (v.20, 7565). Soviet witness Jansons filed such a certificate with the University when he left Arajs Kommando in December, 1941 (v.18, 6853,6875,6). Members of Arajs Kommando did not attend the University according to Soms (5395) and Kalnins (6128).

> and after, which would make it possible for me to better understand the contents of the document." (V.3, 1090).

Without the full context such documents are subject to misinterpretation just as the blind man who touches only the tail of an elephant, perceives an elephant as very like a snake.

In another context Hilberg states:

> ". . . whether I credit Soviet documents . . . I would have to look at it to the nth degree . . . I might probably come to the conclusion that these documents are not to be credited." (V.3 1096)

It is not just the discredited University documents upon which Hilberg relies for his opinion that Kalejs was a member of Arajs Kommando. Hilberg claims he has seen other more compelling documents (v.3, 1063) that he does not describe which were not produced and were not offered into evidence. Hilberg admits, "the central situation including the status of Mr. Kalejs [membership and activities] was

based on documents that weren't introduced" (1063). The only specific document Hilberg referred to that was not introduced was the so-called Abols "testimony," discredited below, that Hilberg claims says Kalejs was the commander of the external guard at Salaspils -- an Arajs Kommando guarded camp. Hilberg opined, based solely upon the discredited alleged Abols testimony, Kalejs was the commander of the Salaspils external guard. [18]

So there exists no Western document and no Western testimony of alleged membership or deeds except that of Hilberg the most frequent OSI witness in these cases.

Hilberg in arriving at his determination of historical "fact" neither requires clear and convincing evidence, nor evidence beyond a reasonable doubt. He crit-

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[18] OSI now claims the Abols statement exists as a Soviet document -- not a Western document. If so, the Soviets have kept it all to themselves.

icizes the judicial burden of proof as too high a burden and Hilberg, himself, determines "fact" as "what is most likely true" (v.3, 1056). No where does Hilberg testify that he concluded Kalejs was a member of Arajs Kommando within a reasonable degree of historical certainty.

Hilberg did not claim to have any personal knowledge of Kalejs, nor did he claim Kalejs was identified in an historical treatise. The hearing judge and the BIA discredited as unacceptable the Abols "testimony" Hilberg relied upon. That ruling was made after Hilberg's testimony. We do not know what Hilberg's opinion would be without giving weight to Abols.

The threshold question is whether or not Kalejs was a member of the so-called Arajs Kommando. It is OSI's claim of such membership that forms the nexus of their case. Without establishing the membership nexus by clear and convincing evidence,

OSI's case failed.

V NEWLY DISCOVERED EVIDENCE

The Petitioner faces a unique situation. OSI took aim at Kalejs by 1984. The IJ ordered deportation in 1988. The BIA entered a final order of deportation in 1992. Before trial OSI had limited access to Soviet selected sources -- Kalejs none.

After the decisions the Soviet Union unexpectedly dissolved. An investigator for the defense could travel and investigate in Latvia but not yet the now Latvian Archives. A notary took statements of several Soviet deposition witnesses. In the Spring of 1993 Kalejs first learned he could enter those Archives. A researcher entered and discovered several Soviet video tape witnesses' 1940s and 1950s statements. Kalejs sought and obtained Latvian history books concerning Nazi and Arajs Kommando conduct in Latvia.

This newly discovered evidence is not

before this Court as part of the record of the immigration hearings concluded in 1988 nor the BIA's 1992 decision on the trial record. It is in the record as exhibits to a Motion for Stay to the Seventh Circuit and as exhibits to an Application for Stay to Justice Stevens. These documents will be referred to as StEX #. Few of the documents are translated from Latvian or Russian and few certified by the Archives due to various constraints.[19]

Essentially the same material was presented to BIA on a motion to reopen. BIA has not ruled and may not be expected to

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[19] However, "free" Latvia may be, the majority of government offices, from the President down to the procurators, are presently held by the former Soviet functionaries. The Archives will not provide a copy machine -- it may not have one. Assistance by the staff is less than enthusiastic. To this point proper certified copies have not been obtained. On January 20, 1994 for the first time Kalejs was informed that his requests for properly certified copies of archive documents would not be approved without the receipt of a written request by Procurator Zakis of the Latvian Republic from his American lawyer. Months may pass prior to the delivery of any certified documents from the archives -- maybe never without judicial assistance.

rule for a substantial period of time. BIA required three years to affirm the IJ. In an effort to completely foreclose all forums to the defense OSI argued to BIA:

> "Respondent's motion in the 7th Circuit to continue oral argument based on these protocols (Jansons', supplied by OSI) and the arguments presented here was rejected by the 7th Circuit. Likewise, the Board should reject these arguments."

If BIA accepts this OSI argument, Kalejs' motion to reopen will be summarily denied. If not, BIA may not decide the Motion to Reopen for several years and then only if Kalejs is imprisoned. Kalejs is 80 years of age suffering from cancer.

From the archives came summaries of statements from the 1940s of Ennitis, a video tape witness; Jansons, a video tape witness; Sgt. Detlavs and Gailis (StEx B, p. 50) who were each identified as members of Arajs Kommando in the newly discovered historical Soviet texts. None of these witnesses mentioned Kalejs' name, includ-

ing Ennitis whose video tape testimony named Kalejs as his commanding officer at Salaspils and Sauriesi Concentration Camps upon which the Seventh Circuit relied. A new statement of video tape witness Strazds informs us he became a KGB agent after the war. (StEx B, p. 55).

New University records provide a bit of the context Hilberg acknowledged was missing for the "University" records introduced. They showed Kalejs' matriculation from December 18, 1941 to March 1, 1942 and from November 5, 1942 to September 30, 1943 (StEx B, p. 59) each corroborating Kalejs' testimony and arguably providing a semblance of an alias defense to concentration camp service at Porkov with the gypsy incident and partial as to Salaspils and Sauriesi alleged service.

Soms' new affidavit (StEx E, p. 77) states he identified Kalejs only because he feared being put back into [prison]

camp and that he knows nothing of Kalejs' war time activities. An additional affidavit from video tape witness Primanis (Pimanis) (StEx E, p. 80) upon whom the Seventh Circuit had relied now states he did not know Kalejs at Salaspils and that 1st Lt. Tone was the exterior guard commander. A marked difference from his video tape testimony that Kalejs was the exterior guard commander at Salaspils.

Based on Hilberg's testimony the Seventh Circuit held:

> "As a company commander, Kalejs was one of six or seven officers who were second in command to Arajs; he had a hundred men or more under his direction." App 7.

Hilberg had identified on OSI prepared Exhibit 19 (v.9, 3197) company commanders of the Arajs Kommando (v.3, 842) -- (1) Cukurs, (2) Kalejs, (3) Kalnins, (4) Laukers, (5) Ozols, (6) Svikeris (v.9, 3197). This is merely lawyer created demonstrative evidence -- not evidence of the mat-

ter asserted therein. Hilberg obtained all the names, **except** Kalejs', from the decision in the case of People v. Arajs, District Court of Hamburg, 1980, Exhibit 22T, (v.11,3634). It names the others.[20]

Kalejs was able to obtain copies of historical books published in Latvia under the Soviet regime.[21] These books are: "KAS IR DAUGAVAS VANAGI": "FALCONS OF DAUGAVAS", Riga 1962 (StEx F, p. 88); "SALASPILS NAVES NOMETNE": "SALASPILS DEATH CAMP", Riga 1973 (StEx F, p. 169); "POLITISKIE BEGLI BEZ MASKAS": "POLITICAL REFUGEES UNMASKED", Riga 1963 (StEx F, p. 480); "NO SS UN SD LIDZ . . .": "FROM SS & SD TO . . .", Riga 1979 (StEx F, p. 691);

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[20] Arajs who died prior to the time the defense offered evidence provided an affidavit where, under oath, Arajs stated: ". . . I also declare under oath that there never was a . . . First Lieutenant Konrads Kalejs, . . . serving under me in the [Arajs Kommando]" (v.20, 7565).

[21] Books produced in Latvia during the illegal Soviet occupation were published only by the Soviet authorities. There was no "free press."

"VAINIGIE UN NELAIMIGIE": "THE GUILTY AND THE UNFORTUNATE", Riga 1989 (St Ex F, p. 780). These books name officers and men of the Arajs Kommando and others involved with the Nazis. They do not name Kalejs and they do not name Abols.[22]

"SALASPILS NAVES NOMETNE", names 1st Lt. Tone as commander of the external guard at Salaspils and Sauriesi, not Kalejs. Eliminating Tone as concentration camp commander and Ozols as adjutant, all seven company commanders of Arajs Kommando are accounted for without Hilberg's arbitrary inclusion of Kalejs: (1) Cukurs, (2) Kalnins, (3) Laukers, (4) Svikeris, (5)

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[22] Some named as members of Arajs Kommando are Major V. Arajs; 1st Lt. Ozols; 1st Lt. Perro; Captain Cukurs; Captain Kalinovskis; Captain Rubenis; Janis Platais; P. Murnieks; Lt. A. Strauchs; Sgt. K. Detlavs; Lt. A. Trucis; A. Petrovskis; Lt. Sipols; H. Krums; K. Rozkalns; T. Abolins; H. Klingeris; J. Likais; K. Strazds; A. Bajars; Lt. Viduss; and Kaufmanis, Jurksaitis, Andermanis as 1st Lt. Tone's men; and Sgt. Dzenis as a camp official; and Freimanis, Gailis, Sgt. Cmutovs, O. Berzins and Sulainis as Salaspils guards.

Kalinovskis, (6) Rubenis and (7) Perro. There was no company commander position remaining that Kalejs' could have filled.

Had Kalejs been a company commander of one of the six or seven companies of the Arajs Kommando, the commander of the external guard of Salaspils Concentration Camp and active in killing thousands of Jews, as OSI alleges, he was highly visible. The failure of so much as the mention of the name Kalejs in any of the 1940s and 1950s protocols or the historical texts points to his innocence.

Therefore, we ask this Court for leave to adduce new evidence before it, in the alternative, pursuant to 28 U.S.C. Sec. 2347 to remand for a new trial to adduce new evidence in hand, and to be obtained.

VI LACK OF DISCOVERY AND BRADY ERROR

Kalejs had requested discovery and specifically requested exculpatory evidence pursuant to Brady v. Maryland, 373 U.S. 83

(1963). OSI objected to both requests maintaining no statute required either general discovery in a deportation case and that the principle of Brady does not apply to its prosecution of deportation matters. The Immigration Judge ordered limited production and refused to enter an order requiring production of evidence favorable to the defense. None of the newly discovered documents were available for the hearing.

Judge Eisele in the dissent states:

> The statutes and regulation [8 U.S.C. Sec. 1252(b) and 8 C.F.R. Sec. 242.16] mandate that the alien "have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government." Did Mr. Kalejs have such "reasonable opportunity" here? One could, by interpreting the language quoted from the regulation expansively, argue that it simply incorporates Brady v.Maryland, Washington v. Texas, and the evidentiary rules governing cross-examination. But even if one interprets the language narrowly and concludes that Mr. Kalejs had a reasonable opportunity to examine the evidence that the government actually chose to use against him, it can be

> questioned whether he had a "reasonable opportunity to present evidence on his own behalf," considering the restrictions placed on him in relation to discovery. And, in no event can it be said that he had a "reasonable opportunity to cross-examine witnesses presented by the government," considering the same limitations on discovery (including denial of pre-deposition access to the witnesses and to their prior statements) and the locus and circumstances of the taking of the depositions, including the role of the Soviet procurator in restricting cross-examination. If the regulation does not require this conclusion, surely the Constitution does. (APP 80,81).

The Supreme Court in Brady held: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

OSI refused a Brady production answer.

OSI did not produce the book "SALASPILS NAVES NOMETNE": "SALASPILS DEATH CAMP", Riga 1973, page 109 of which OSI placed into evidence (V.20 7735). The defense

obtained this book after the BIA decision which is now shown to be exculpatory. It states 1st Lt. Tone was the commander of the exterior guard at Salaspils and Sauriesi, not Kalejs. It was in OSI's possession before trial in 1987 (V.20 7735).[23]

In Demjanjuk v. Petrovsky, 10 F.3d 338, 1993 U.S. App. Lexis 29694 (6th Cir. 1993), the court held:

> "We believe Brady should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against."

Here OSI made every effort to brand Kalejs a mass murderer intimately involved in the murder of 73,000 Jews.

In Demjanjuk, the former Director of

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[23] OSI points out that Kalejs' attorney argued to the BIA that this book does not mention Kalejs, however, he did not have possession of the book. If he had these Soviet Latvian books, he would have offered them for the defense as OSI offered Hilberg's book. This and the other books would have been used to confront Hilberg. Had Hilberg been made aware of this historical information Hilberg may have withdrawn this opinion that he believed Kalejs was a member of Arajs Kommando.

OSI, Ryan, testified it is "fundamentally unfair" not to follow the Brady principle in OSI cases. Ryan testified he intended his office make full disclosure of exculpatory material. The OSI director's interpretation of required fundamental fairness in all OSI cases is persuasive.[24] This Court should exercise its power to insure lower courts provide fair hearings.

VII. THE SEVENTH CIRCUIT'S CONSTRUCTION OF THE HOLTZMAN AMENDMENT CONFLICTS WITH THOSE OF THE SIXTH AND NINTH CIRCUITS

The Seventh Circuit failed to make explicit findings on each contested issue. Rather, it approved deportation under the Holtzman Amendment for "seeming participation" in direct conflict with the decisions of the Sixth Circuit in Petkiewytsch

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[24] It was for withholding exculpatory information from Demjanjuk's defense resulting in his death sentence that OSI attorneys were found to have engaged in fraud by the Sixth Circuit. OSI has filed a petition for rehearing *en banc*. It can reasonably be expected that the Court will be asked to review the Demjanjuk case which involves vital similar issues.

v. INS, 945 F.2d 871 (6th Cir. 1991) and the Ninth Circuit in Laipenieks[25] v. INS, 750 F.2d 1427 (9th Cir. 1985). Is Kalejs' liberty to remain in the U.S. after 35 years to be based on the fact his home is Chicago, not Cleveland or Los Angeles?

Laipenieks had served with the Latvian Political Police, the S.D., organization that collaborated with the Nazis to apprehend communists and other Soviet sympathizers. 750 F.2d at 1429. The BIA had found him deportable under the Holtzman Amendment. Id. The Ninth Circuit reversed. The court analyzed the Holtzman Amendment, including its relationship to the Displaced Persons Act of 1948 (the "DPA"). Id. at 1430. Most "helpful" in interpreting the DPA, was the Court's

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[25] The newly discovered Latvian Book, "Falcons of Daugavas," names not only Arajs members, but German collaborators who were not Arajs members. e.g., Edgar Laipenieks (S.D. Man: See Laipenieks, supra). It does not mention Kalejs.

decision in Fedorenko v. United States, 449 U.S. 490 (1981). The Ninth Circuit quoted the Court's footnote 34 at 512-13 n. 34, the Ninth Circuit wrote:

> "Fedorenko stated that the proper analysis under the statute was whether the acts of the individual amount to assisting in the persecution of civilians." 750 F.2d at 1431 (emphasis added).

The Laipenieks court found "the language and intent" of the Holtzman Amendment "requires that deportability may only be sustained when the evidence established that the individual in question personally ordered, incited, assisted or otherwise participated in the persecution of individuals." Id. (emphasis added). The Ninth Circuit's interpretation was "mandated first by the plain language" of the Holtzman Amendment and by its legislative history: Representative Holtzman's statement that "[t]he bill is intended to cover active participation and not mere acquiescence by the population as a whole," in

support of its view that "active personal involvement in persecutorial acts needs to be demonstrated." Id., 124 Cong. Rec. 31649 (1978).

The Ninth Circuit concluded, guided by Fedorenko and legislative intent, Holtzman Amendment deportation requires:

> "that the government provide proof of personal active assistance or participation in persecutorial acts . . ." Id. at 1432.

The Seventh Circuit next construed the Holtzman Amendment in Schellong v. INS, 805 F.2d 655 (7th Cir. 1986). [26] The Seventh Circuit simply noted that, in an earlier denaturalization case, United States v. Kairys, 783 F.2d 1374, 1377 n. 3 (7th Cir. 1986), it had held that "service as a Nazi camp guard equaled persecution .

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[26] The Seventh Circuit failed to consult legislative history. The Sixth and Ninth Circuits, by contrast, did. Petkiewytsch, 945 F.2d at 877-90; Laipenieks, 750 F.2d at 1430-32. In addition, the Seventh Circuit overlooked the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).

. . without proof of personal involvement in atrocities." (805 F.2d at 660) and that the Holtzman Amendment required no proof of personal participation in atrocities.

In response to Schellong's citation of Laipenieks and United States v. Sprogis,[27] 763 F.2d 115 (2d Cir. 1985) (a denaturalization case), the Seventh Circuit stated that "insofar as these cases hold that personal involvement in atrocities is necessary to have assisted in persecution for purposes of the DPA or the Holtzman Amendment, they conflict with Fedorenko, 449 U.S. at 512 n. 34." 805 F.2d at 660.

The Sixth Circuit in Petkiewytsch v. INS, 945 F.2d 871 (6th Cir. 1991) noted that, in Schellong, the Seventh Circuit had "specifically rejected the argument that an individual must have actively

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[27] "Falcons of Daugavas" also names Sporgis (police in Modona): See United States v. Sporgis, 763 F.2d 115 (2nd Cir.1985).

participated in persecution to be deportable under the Holtzman Amendment," and that Schellong's holding was reaffirmed in Kulle. . . ." Id., 945 F.2d at 878.

The Sixth Circuit then confirmed the conflict between the Seventh Circuit's rulings and the Ninth Circuit's, noting that "[a]nother court reached a different conclusion in Laipenieks . . . ." Id.

To the Sixth Circuit, particularly probative of Congress's intent was Representative Holtzman's reference to "war criminals" nineteen times on the House floor as the purpose of the bill she sponsored, her representation the bill was directed "solely to those persons who engaged in war crimes." Petkiewytsch, 945 F.2d, 879.

> "If, as the Supreme Court stated, the focus under the DPA should be on the 'particular conduct' of the immigrant, then given the legislative history of the Holtzman Amendment, that focus should be even more searching under [the Amendment]." Id. 945 F.2d at 880.

The Sixth Circuit held for Petkiewytsch.

OSI did not seek review of these adverse judgments in this Court, allowing the conflict to stand.

Because of the need for a clear and uniform legal standard to govern the proceedings, a definitive interpretation of the Holtzman Amendment by this Court is warranted. In the past, the Court has granted certiorari, even in the absence of circuit conflicts, to resolve questions relating to the proper administration of the immigration and naturalization laws. Cf. United States v. Menasche, 348 U.S. 528, 531 (1955); Baumgartner v. United States, 322 U.S. 665, 666 (1944); United States v. Ness, 245 U.S. 319, 321 (1917) (certiorari merited when the question posed is important to uniform administration of naturalization laws).

Petitioner submits that here, as well, the need for a clear and uniform rule on important questions relating to both sub-

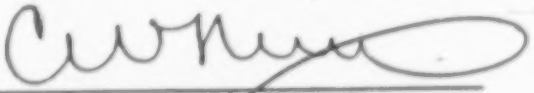
stantive administration of the immigration laws and vital procedural and evidentiary standards calls for this Court's review.

CONCLUSION

For the foregoing reasons, petitioner, Konrads Kalejs, respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Dated: January 31, 1994

Respectfully submitted,



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